Supreme Court, U.S.
FILED
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No. 91-1309

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CORTEC INDUSTRIES, INC. and
CORTEC HOLDINGS, INC.,
Petitioners,

v.

WESTINGHOUSE CREDIT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT WESTINGHOUSE CREDIT CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Should a lender whose unexercised warrant is retired by the issuer prior to the sale of the issuer's outstanding shares to the buyer be deemed the buyer's "seller" under Section 12(2) of the Securities Act of 1933?

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BRIEF OF RESPONDENT WESTINGHOUSE CREDIT CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

1. *The Transaction.* This lawsuit arises out of the May 1989 sale of all of the outstanding shares of Cortec Industries, Inc. ("old Cortec"), a pre-engineered metal building manufacturer, to Cortec Acquisition, Inc. ("Acquisition"), a wholly-owned subsidiary of petitioner Cortec Holdings, Inc. ("Holdings"). Both Acquisition and

Holdings were formed and controlled by Leach McMicking & Company, L.P. ("Leach McMicking") for the purpose of acquiring old Cortec. (A-10; B-5).[1] After acquiring old Cortec's outstanding shares, Leach McMicking merged Acquisition into old Cortec, with petitioner Cortec Industries, Inc. ("Cortec") emerging as the surviving entity. (A-13; B-5, 27).

Respondent Westinghouse Credit Corporation ("WCC") was neither one of the sellers of old Cortec's shares to petitioners nor one of its professional advisors.[2] Rather, at the time petitioners were negotiating to purchase all of the shares of old Cortec, WCC owned a warrant to purchase 111 shares of old Cortec's stock, which it had received years earlier as part of its consideration when it loaned money to old Cortec. (A-7; B-7). This warrant had never been exercised, and was retired by old Cortec immediately prior to the sale of old Cortec's outstanding shares to petitioners. (*E.g.*, A-36, B-28). WCC never agreed or offered to sell its warrant to petitioners. Instead, as the Stock Purchase Agreement expressly states at Section 1.1: "On the Closing Date, immediately prior to the Closing, WCC shall sell and surrender to [old Cortec], and [old Cortec] shall purchase and cancel, the Warrant." The petitioners, in turn, agreed to purchase "at the Closing referred to in Section 2 of this Agreement, all of the outstanding shares of stock . . . ." Thus, under the express terms of the Stock Purchase Agreement, WCC's warrant was purchased and cancelled by old Cortec prior to the purchase by petitioners of old Cortec's outstanding shares. (A-36; B-26 to 28).

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[1] Citations to the Petition For a Writ of Certiorari will be abbreviated as follows: "Pet. at ___" will refer to petitioners' brief; "A-___" will refer to Appendix A to the Petition (the opinion of the Second Circuit); and "B-___" will refer to Appendix B to the Petition (the district court's decision).

[2] Pursuant to Rule 29.1, respondent WCC discloses that it is wholly owned by Westinghouse Financial Services, Inc., which, in turn, is wholly owned by Westinghouse Electric Corporation. WCC has no subsidiaries that are not wholly owned.

2. *The Complaint*. On January 10, 1990, the new owners of Cortec sued old Cortec's shareholders, officers, directors, investment bank, accountant, and warrantholder under the federal securities laws, RICO, and the common law for injuries allegedly arising from their purchase of old Cortec's stock. (B-4). Although the complaint did not so indicate, the district court found—and petitioners subsequently conceded—that Cortec was suing only in its capacity as the successor to Acquisition, the purchaser of old Cortec, and *not* as "old Cortec" itself. (B-23 to 24).

The complaint alleges that the "Selling Defendants"—whom petitioners defined to *exclude* WCC (B-7)—decided prior to December 13, 1988 to sell old Cortec's stock and hired an investment bank, Bowles Hollowell Connor & Co. ("BHC"), to assist and prepare an Offering Memorandum. (B-8). The complaint then acknowledges that "*BHC prepared [the] 48-page offering memorandum*, with extensive exhibits, dated December 13, 1988, *based on information furnished by the Selling Defendants* as well as other materials deemed reliable by BHC." (B-8) (emphasis added). WCC is not alleged to be a "Selling Defendant," nor to have reviewed the Offering Memorandum, provided information to BHC or otherwise participated in its preparation, nor even to have received a copy prior or subsequent to its distribution. (*See* B-8 to 14; B-28 to 29).

The complaint proceeds to claim that the Selling Defendants, BHC, and old Cortec's accountants (but, again, *not* WCC): (i) made representations to Leach McMicking that confirmed the accuracy of the information presented in the Offering Memorandum; (ii) made specific oral and written representations about old Cortec's financial and operating condition which induced Leach McMicking to recommence negotiations for the purchase of old Cortec's stock; and (iii) made additional representations and warranties in the Stock Purchase Agreement confirming the information previously provided. As the district court

found, the complaint does not contain a single allegation specifically charging *WCC* with making, preparing, or authorizing even one misleading statement with respect to the transaction. (B-26 to 29). Instead, the complaint alleges that, "[i]n reliance upon [old Cortec's] financial statements *and the representations of BHC and the Selling Defendants*,"—not WCC—"Leach McMicking on March 27, 1989 submitted a revised offer," and through Acquisition entered into the "Stock Purchase Agreement" on April 11, 1989. (B-13) (emphasis added).

3. *WCC's Motion to Dismiss.* WCC moved in February, 1990 under Fed. R. Civ. P. 12(b)(6) to dismiss petitioners' only two claims against it (under Sections 12(2) and 17(a) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 771(2) and 77q(a)), reasoning that: (i) no private right of action exists under Section 17(a); and (ii) no cause of action could be stated against WCC under Section 12(2) in light of *Pinter v. Dahl*, 486 U.S. 622 (1988), because WCC did not sell anything to petitioners and did not solicit their purchase of old Cortec's stock. WCC alternatively argued that neither claim was asserted with the particularity required by Fed. R. Civ. P. 9(b). The other defendants filed their own motions to dismiss. On January 3, 1991, almost a full year after the complaint was filed, the district court issued a forty-page decision that: (i) dismissed without leave to replead all Section 17(a) claims (B-21); (ii) dismissed without leave to replead all RICO claims (B-37); (iii) dismissed with leave to replead all claims against other defendants under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b) (B-48); and (iv) while sustaining all claims under Section 12(2) against other defendants, dismissed the claim against WCC without leave to replead. (B-29 to 30, 49 to 50).

4. *The Appeal to the Second Circuit.* Petitioners appealed only the dismissal of the Section 12(2) claim against WCC without leave to replead. On November 8,

1991, the Second Circuit affirmed the dismissal with prejudice of the claim that WCC was a direct "seller" of securities to petitioners:

> As these facts make clear, Westinghouse was a seller to old Cortec, not to plaintiffs. Under *Pinter*, plaintiffs may not therefore assert a claim against their seller's seller. Moreover, as the nature of the above transaction is undisputed—plaintiffs dispute the legal significance that should be given these facts, not the facts themselves—no facts may be alleged that would cause Westinghouse to be liable under *Pinter* for § 12(2) "seller" liability. Hence, Judge Haight correctly dismissed plaintiffs' § 12(2) claim with prejudice insofar as it was based on seller liability. (A-36 to 37).

The Second Circuit also rejected petitioners' current claims that the district court's decision ignored the "economic reality" of the transaction, and that if WCC were to prevail a party could intentionally structure a transaction to avoid exposure under the securities laws. (*Compare* Pet. at 27 *with* A-38 to 39). Although the Second Circuit reversed the district court's dismissal with prejudice of petitioners' "solicitation" claim, holding that "plaintiffs should be granted leave to replead to assert facts, if such exist, that would show that Westinghouse solicited the purchase of old Cortec for its own financial gain" (A-43), petitioners have elected not to replead their "solicitation" claim, and the forty-five day period set by the district court for repleading that claim has expired.

REASONS FOR DENYING THE WRIT

The Second Circuit correctly applied Section 12(2) to hold that WCC was not a direct seller of securities to petitioners. The decision does not conflict with any decision of this Court, and petitioners concede that it does not conflict with any decision of any other court of appeals. The issue presented is fact-specific and not of continuing significance to the administration of the federal securities laws.

I. THE SECOND CIRCUIT CORRECTLY INTERPRETED *PINTER v. DAHL*, 486 U.S. 622 (1988)

Less than four years ago, this Court addressed the very issue at the heart of this petition: the proper scope of "seller" liability under Section 12 of the 1933 Act. After extensively reviewing the relevant legislative history and precedents, this Court rejected arguments for a more expansive definition of "seller" and held that Section 12(1) imposes liability upon only two classes of defendants: (i) "the owner who passed title, or other interest in the security, to the buyer for value;" and (ii) "the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter*, 486 U.S. at 642, 647. As the Court expressly stated: "There is no support in the statutory language or legislative history for expansion of § 12(1) primary liability beyond *persons who pass title* and *persons who 'offer,'* including those who 'solicit' offers." *Id.* at 650 (emphasis added).

While *Pinter* did not expressly apply to cases brought under Section 12(2), *id.* at 642 n.20, all courts of appeals considering the issue have found that *Pinter's* analysis applies equally to Section 12(2). *See, e.g., Ryder International Corp. v. First American National Bank*, 943 F.2d 1521, 1526-30 (11th Cir. 1991); *Craftmatic Securities Litigation v. Kraftsow*, 890 F.2d 628, 635 (3d Cir. 1989); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 536 (9th Cir. 1989); *Crawford v. Glenns, Inc.*, 876 F.2d 507, 510 (5th Cir. 1989); *Capri v. Murphy*, 856 F.2d

473, 478 (2d Cir. 1988) (applying *Pinter* to Section 12(2) claim because "we previously have held that the language of Sections 12(1) and 12(2) is identical in meaning").

This petition concerns only whether WCC was petitioners' "seller," and not whether WCC "solicited" a sale under Section 12(2). To be liable as a direct "seller," this Court in *Pinter* held that the language of Section 12 demands that the defendant pass title to the buyer: "only a defendant 'from' whom the plaintiff 'purchased' securities may be liable, narrow[ing] the field of potential sellers." *Pinter*, 486 U.S. at 643-44. Anticipating the issue raised here, this Court presciently wrote: "One important consequence of this provision is that § 12(1) imposes liability on only the buyer's immediate seller; remote purchasers are precluded from bringing actions against remote sellers. *Thus, a buyer cannot recover against his seller's seller.*" *Id.* at 644 n.21 (emphasis added).

Petitioners' complaint concedes that WCC did not sell any securities to petitioners: "The Management Defendants, Sum Holding, and Woodlawn sold their Cortec shares to *plaintiffs*. WCC sold the Westinghouse Warrant *as part of the transaction*." (Complaint at ¶ 60) (emphasis added) (*See* B-27). The complaint also delineated carefully between the "Selling Defendants" on the one hand and WCC on the other. (B-7). Nowhere do petitioners allege that WCC transferred title to any securities to petitioners, nor can petitioners legitimately dispute that WCC's warrant was surrendered to old Cortec and cancelled *prior* to petitioners' purchase of old Cortec's outstanding shares. Under these circumstances, the courts below correctly held that WCC was "a seller to old Cortec, not to plaintiffs," and thus could not be liable to the petitioners as a direct seller under Section 12(2). (A-36 to 37; B-28). *See, e.g., Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989) (after *Pinter*, liability extends only to those who are *in privity* with the purchaser or who solicit the purchase for financial gain).

II. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT CONCERNING THE REMEDIAL PURPOSE OF THE SECURITIES LAWS

To avoid *Pinter*, petitioners claim that the "remedial purposes" of the securities laws required the courts below to disregard the form of the transaction. (Pet. at 30-38). This argument ignores both the Court's rejection of the same plea in *Pinter* and the availability of other statutes, such as Section 10(b), to redress forms of securities fraud not covered by Section 12(2).

As this Court held in *Pinter*:

> [T]*he sole justification* [*plaintiff*] *advances is that extending § 12 liability . . . protects investors and serves the "remedial purposes" of the Securities Act.* [Citation omitted]. The Court has acknowledged that "it is proper for a court to consider . . . policy considerations in construing terms in [the federal securities] Acts." [Citation omitted]. And the Court has recognized that Congress had "broad remedial goals" in enacting the securities laws and providing civil remedies. [Citations omitted]. Accordingly, the Court itself has construed securities laws "'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" [Citation omitted]. But the Court never has conducted its analysis entirely apart from the statutory language. "*The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.*" [Citation omitted]. The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section. [Citation omitted.] *The broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision "'more broadly than its language and the statutory scheme reasonably permit.'"* [Citation omitted.] We must assume that Congress meant what it said.

Pinter, 486 U.S. at 652-53 (emphasis added). Not even mentioning this on-point discussion in *Pinter*, petitioners reply upon *Reves v. Ernst & Young*, 494 U.S. 56 (1990) and *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985). Both *Reves* and *Landreth*, however, addressed whether certain financial instruments were covered by the federal securities laws, not who should be deemed a "seller" under Section 12(2). Moreover, on closer examination, *Reves* and *Landreth* actually support the proposition that when Congress' intent is clear and explicit concerning a particular provision in the securities laws (as the Court held was the case concerning the scope of Section 12 "seller liability" in *Pinter*), an expansive inquiry into the "economic realities" of a transaction is *not* appropriate. *Reves*, 494 U.S. at 62 ("A commitment to an examination of the economic realities of a transaction does not necessarily entail a case-by-case analysis of every instrument, . . . [such as those] obviously within the class Congress intended to regulate because they are by their nature investments"); *Landreth*, 471 U.S. at 690 ("economic reality test" does not apply when "instrument involved is . . . plainly within the statutory definition").

In any event, the courts below did take account of the "economic reality" of the transaction in reaching their decisions. As the Second Circuit observed:

> It was plaintiffs not the district court who were blind to, as plaintiffs term it, the economic reality of this transaction. It is in the nature of the marketplace that parties take into account the risk of liability under the securities laws—and, conversely, the ability to hold those with whom they transact business liable—when calculating the costs and benefits of entering into a particular transaction.

(A-37 to 38). Petitioners do not and cannot claim that they were unaware of how the Cortec transaction was structured—petitioners were sophisticated investors, assisted by able professionals, who actively negotiated the agreements documenting the transaction directly with old

Cortec. Petitioners knew that the documents reflected that WCC agreed only to sell its unexercised warrant back to old Cortec, and old Cortec agreed to extinguish the warrant *prior to* the sale of its outstanding shares to petitioners. Bearing in mind *Pinter*'s teaching that "§ 12 focuses on the defendant's relationship with the plaintiff-purchaser, . . . [not] on the defendant's degree of involvement in the securities transaction and its surrounding circumstances," *Pinter*, 486 U.S. at 651, the courts below were correct to find that WCC was not petitioners' "seller."

Petitioners concede that the numerous cases cited to buttress their "remedial purpose" argument are not in conflict with the Second Circuit's decision below. (Pet. 36-37). Further, none of these cases address who is a "seller" under Section 12(2), but who is a "purchaser" under Section 10(b) of the 1934 Act. *E.g.*, *Grubb v. Federal Deposit Ins. Corp.*, 868 F.2d 1151, 1162 (10th Cir. 1989) (issue was whether plaintiff had standing as a Section 10(b) purchaser where securities were purchased through a holding company); *Norris v. Wirtz*, 719 F.2d 256 (7th Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (trust beneficiary qualified as "purchaser" under Section 10(b) since fraud was made "in connection with" the sale of securities to a trust); *United Department Stores, Inc. v. Ernst & Whinney*, 713 F. Supp. 518 (D.R.I. 1989) (shareholders who loaned corporation funds to purchase shares in reliance on defendant's misrepresentations deemed "purchasers" for purpose of Section 10(b)); *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080, 1093 (S.D.N.Y. 1977), *aff'd*, 636 F.2d 1201 (2d Cir. 1980) (beneficiary of trust who was only person harmed by transaction deemed "*de facto* buyer"); and *Heyman v. Heyman*, 356 F. Supp. 958 (S.D.N.Y. 1973) (same).[3]

[3] Petitioners also rely on *H.B. Holdings Corp. v. Scovill Inc.*, 1990 Fed. Sec. L. Rep. (CCH) ¶ 95,201 (S.D.N.Y. March 23, 1990) (Kram, J.). In *H.B. Holdings*, defendants challenged plaintiff's standing because the actual purchaser (the equivalent in this case

Petitioners' Section 10(b) cases are not relevant to the analysis under Section 12(2) because Section 10(b) imposes liability upon *anyone* who makes a misrepresentation "in connection with" the purchase or sale of a security, whereas Secion 12(2) *restricts* liability to only one "who . . . offers or sells a security . . . by means of a [false or misleading] prospectus or oral communication . . . to the person purchasing such security from him." As this Court held in *S.E.C. v. National Securities, Inc.*, 393 U.S. 453, 466 (1969):

> Although the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen, ordinary rules of statutory construction still apply. The meaning of particular phrases must be determined in context. [Citation omitted]. Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws[.]

Such caution is particularly required here. While Section 10(b) of the 1934 Act requires proof of scienter and reliance, thereby providing some safeguards against limitless liability, a defendant is strictly liable for misrepresentations under Section 12(2) of the 1933 Act once deemed a "statutory seller," unless he sustains the statutory "burden of proof that he did not know, and in the exercise of reasonable care could not have known, of

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of "Cortec Acquisition") had been merged into the purchased entity and no longer existed. *Id.* at 95,814-15. The court held that "*as the purchaser*," the company into which the purchaser had merged had standing to sue (*id.* at 95,815) (emphasis added), a proposition WCC does not challenge. Indeed, no one questions whether Cortec can sue here as the successor to the actual purchaser, Acquisition; rather, the dispute is whether WCC sold anything to *Acquisition*. On that point, *H.B. Holdings* actually supports WCC: "'Persons who are not *in privity* with the [purchaser] . . . will now be statutory sellers within the meaning of *Pinter* [only] if they solicited the sales in question for a financial gain." *H.B. Holdings* at 95,815 (*quoting Wilson*, 872 F.2d at 1126) (emphasis added).

such untruth or omission." This Court in *Pinter* specifically rejected arguments for expanding the scope of "seller liability" under Section 12 based on the petitioners' invocations to the 1933 Act's remedial purpose, holding: "[w]e find it particularly unlikely that Congress would have ordained *sub silentio* the imposition of strict liability on such an unpredictably defined class of defendants." *Pinter*, 486 U.S. at 652. *See also, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976) (scienter required under Section 10(b) of the 1934 Act because Congress, when negligence alone was required, placed other restrictions on the cause of action).

Petitioners' attempt to reopen the parameters of Section 12 seller liability set down in *Pinter* should thus be rejected. This Court warned in *Pinter* against injecting vague concepts into the Section 12 analysis because of "the strict liability nature of the statutory cause of action." *Pinter*, 486 U.S. at 652. Refusing to "introduce[] an element of uncertainty into an area that demands certainty and predictability," the Court specifically rejected a definition of "seller" that would result in decisions "made on an *ad hoc* basis, offering little predictive value to participants in securities transactions." *Id.* at 652.

In circumscribing the scope of "statutory sellers," *Pinter* did not, as petitioners suggest, create a "loophole" or leave unresolved who besides the seller in privity with the plaintiff can be found liable. Rather, *Pinter* expressly defined liability under Section 12 to include only those persons passing title to the buyer *or* actually soliciting the plaintiff's purchase through false and misleading statements for pecuniary gain. *Id.* at 642, 647, & 650. Parties who make representations directly to plaintiffs to solicit their stock purchases are still considered "sellers" under *Pinter* regardless of whether plaintiffs purchased securities directly from them.

Petitioners' contention that "a group of potential sellers could employ a false or misleading instrument, centralize

their shares in one judgment-proof seller's hands immediately prior to transfer to the ultimate purchaser, and thereby avoid liability unless each of them actively solicited the sale" demonstrates a lack of understanding of Section 12(2) and of the securities laws in general. (Pet. at 43). First, this hypothetical group of "potential sellers" would be subject to Section 12(2) liability if they solicited the sale. Second, this group would be subject to liability under Section 10(b) for making misrepresentations in connection with the purchase or sale of a security. *See, e.g., Ryder*, 943 F.2d at 1529 ("[W]e are quite convinced that section 10(b) of the 1934 Act, the 'catch-all' anti-fraud provision, and its accompanying Rule 10b-5 adequately fill any gaps created by applying *Pinter* to section 12(2)."). In short, the Second Circuit's decision in this case—on facts far different from petitioners' far-fetched hypothetical—in no way "opens the door for sellers of securities to structure transactions in such a way as to escape liability for disseminating false and misleading prospectuses." (Pet. at 3).

Moreover, characterizing WCC as a "seller" under Section 12(2) would not advance the policies underlying that statute and, in fact, would deter parties like WCC from becoming "involved in the transaction, even peripherally, [because] it would become impossible to avoid the risk of liability." *Pinter*, 486 U.S. at 654 n.29. The securities laws provide more than adequate remedies to protect purchasers who claim to have been injured by misrepresentations in the solicitation and purchase of securities. The Section 12(2) claim based on WCC's status as an actual "seller" was dismissed not because of a "technicality," as petitioners insist, but because WCC's conduct in accepting old Cortec's invitation to surrender its warrant did not transform WCC into petitioners' seller and expose WCC to liability for others' alleged misrepresentations.

III. THE ISSUE PRESENTED IS FACT-BOUND AND IS UNLIKELY TO BE OF CONTINUING IMPORTANCE

The question presented by this petition, even as formulated by petitioners, is peculiar to this case and raises only an abstruse, narrow question of statutory interpretation: whether the definition of an *actual* seller under Section 12(2) (as distinct from someone deemed a "seller" based on soliciting the purchase) should be expanded beyond the person who passes title to the buyer. This question is not likely to recur, nor to be of continuing importance to the administration of the federal securities laws. Only four courts have to date cited to the district court or Second Circuit decision, and none addresses the question of seller liability.[4] Indeed, in the almost four years since this Court decided *Pinter*, no other case located by either party presented the question raised by these facts, even though hundreds of cases have addressed the scope of seller liability under Section 12(2) in the wake of *Pinter*.

The district court and the Second Circuit have separately considered and rejected petitioners' arguments in thorough, well-reasoned decisions. Further, the Second Circuit's decision properly applied this Court's precedents to the unique facts of this case, and its decision does not conflict with those of other circuits. Under these circumstances, further review by this Court is not warranted.

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[4] Three decisions cite to the Second Circuit decision on procedural issues: *Schonberger v. Serchuk*, No. 89 Civ. 7094, 1992 WL 27074, at *11 (S.D.N.Y. Jan. 31, 1992) (discussing leave to replead); *Landy v. Heller, White & Co.*, No. 88 Civ. 2932, 1991 WL 285771, at *7 (S.D.N.Y. Dec. 18, 1991) (same); *United States v. District Council*, 778 F. Supp. 738, 749 n.3 (S.D.N.Y. 1991) (discussing when movant may attach documents outside pleadings on Rule 12(b)(6) motion). The fourth case cites to the district court's holding that Section 17(a) does not create a private right of action. *Rickin v. Diversified Realty Group Partners*, 1991 Fed. Sec. L. Rep. (CCH) ¶ 96,090, at 90,464 (S.D.N.Y. Feb. 19, 1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: March 6, 1992
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